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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOSE GONZALO DIAZ VILLALTA, Defendant and Appellant.	D070684 (Super. Ct. No. 12HF0628)

APPEAL from a judgment of the Superior Court of Orange County, Lance P. Jensen, Judge. Affirmed.

Mark D. Johnson, under appointment by the Court of Appeal, for the Defendant and Appellant.

Kamala Harris, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, Charles C. Ragland, Scott C. Taylor and Kathryn Kirschbaum, Deputy Attorneys General, for the Plaintiff and Respondent.

Nine counts of criminal charges were originally brought in Orange County Superior Court against appellant Jose Gonzalo Diaz Villalta for committing offenses on

multiple children. The jury convicted Villalta on counts 1 and 2 of committing forcible lewd acts on a child under Penal Code[1] section 288, subdivision (b)(1); count 3 of aggravated sexual assault of a child under section 269, subdivision (a)(4); counts 4, 5, and 6 of committing lewd acts on a child under section 288, subdivision (a)(1); and count 7 of sexual penetration by force under section 289, subdivision (a)(1). The trial court sentenced Villalta to 90 years to life in prison, consisting of six consecutive 15-year-to-life terms in prison on counts 1, 2, 3, 4, 6, and 7, and a concurrent 15-year-to-life term on count 5.

Villalta challenges only his count 1 conviction under section 288, subdivision (b)(1) as to victim S.A.[2] He contends that a reasonable jury could not conclude beyond a reasonable doubt that he used force beyond that necessary to commit the lewd acts, and he requests that his conviction be reduced from a violation of section 288, subdivision (b)(1), which requires forcible lewd conduct, to the lesser included offense of section 288, subdivision (a). We conclude substantial evidence supports the jury's finding that Villalta used the requisite force, and also used duress, to sustain the conviction. We therefore affirm the judgment.

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1 Statutory references are to the Penal Code.

2 S.A. was originally identified in the information as Jane Doe 1. The information was amended by interlineation to identify S.A.'s first name and last initial as G.A. The prosecutor later clarified that S.A. went by the first name starting with S. rather than G. We refer to her as S.A. throughout.

FACTUAL AND PROCEDURAL BACKGROUND[3]

Villalta's wife Rosa, who is also known as Hilda, ran a babysitting business out of the home they shared with their two children and several renters. Hilda babysat several children who lived in the apartment complex, including S.A., who lived downstairs from Villalta and Hilda. Villalta sexually molested some of the children while they were under his wife's care. Hilda cared for S.A. and her younger sister while S.A. was between the ages of five and thirteen years old. S.A.'s mother usually dropped her and her sister off in the morning before school and picked them up late in the afternoon after school. S.A. testified approximately eight years after leaving Hilda's care.

S.A. testified that Villalta began touching her inappropriately when she was about six and a half or seven years old. In the first instance, Villalta lured S.A. into a closet by saying he wanted to show her a new toy or a gift. Once inside the closet, Villalta closed the door behind them. S.A. testified that Villalta "took [her] hand and he put it on the outside of his pants where his . . . penis [was] and . . . told [her] he wanted to touch [her]" and that he "wanted [her] to touch him onto his private part." S.A. then testified regarding Villalta's conduct after taking her hand and placing it on him:

"[Prosecutor:] When he grabbed your hand and put it on the outside of his clothes over his penis, did you try to take your hand away?

"[S.A.:] Yes.

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3 The factual background is limited to facts pertaining to Villalta's appeal of his conviction on count 1. The People made clear that count 1 exclusively relates to the lewd act he committed against S.A. in the closet of Hilda's home.

"[Prosecutor:] Did he allow you to take your hand away?

"[S.A.:] No.

"[Prosecutor:] After he got you in the closet and closed the door behind you, did you try to get out of that closet?

"[S.A.:] Yes.

"[Prosecutor:] Did he allow you to leave the closet?

"[S.A.:] No."

The incident ended when Villalta heard Hilda open the front door to the apartment, causing him to let S.A. out of the closet. S.A. testified that after the first incident, Villalta inappropriately touched her between thirty and forty more times.

DISCUSSION

Villalta contends there is insufficient evidence to support his conviction on count 1 because S.A.'s testimony does not show he made S.A. touch him, or prevented her from removing her hand, by means of force. He acknowledges that the requisite force must be "substantially different from or substantially greater than that necessary to accomplish the lewd act itself," but he points out there are many ways a defendant might get a child to engage in physical touching without force, such as by verbally persuading the child or by placing the child's hand on the defendant's body. Villalta argues that forcible lewd conduct would have, in his case, required using some measure of force beyond simply placing S.A.'s hand on his penis, and here, he could have refused to allow S.A. to remove her hand or leave the closet by simply verbally persuading her to keep her hand on him and stay in the closet. Specifically Villalta argues: "Logic therefore dictates that the

force required to commit a violation of [a nonforceful lewd act], would necessarily include that amount of force needed to place the hand of a non-resisting child onto the body of the defendant. A defendant therefore can be convicted of violating section 288, subdivision (b), only if he uses force that is substantially greater than required *to place the child's hand on his body*." (Italics added.) He argues such evidence is absent under the definition provided by the court in *People v. Raley* (1992) 2 Cal.4th 870 (*Raley*).

The People respond that Villalta's test is not the law; that "[p]hysically controlling the movement of a victim's hand in order to place it on the offender's body is not necessary for the commission of this lewd act." They maintain that by taking control of S.A.'s hand to make her touch his penis over his clothes, Villalta used force substantially greater than that required to get S.A. to touch him. The People argue further that Villalta used unnecessary force to continue his act despite S.A.'s attempt to remove her hand or leave the closet; that the jury could reasonably infer he held onto S.A.'s hand while she tried to pull away. Finally, the People argue Villalta accomplished his act by means of duress, as S.A. was a young child being taken advantage of by an older man in an authority role. As we explain, we agree with the People.

I. *Standard of Review*

On Villalta's substantial evidence challenge, our task is to review the whole record in the light most favorable to the judgment and determine whether it discloses evidence that is reasonable, credible and of solid-value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.) "We presume in support of the judgment the existence of every fact

the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility." (*Ibid.*; *People v. Young* (2005) 34 Cal.4th 1149, 1181.) Even if significant evidence to the contrary exists, the testimony of a single witness providing credible evidence can be sufficient to uphold the jury's finding. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) "The same standard also applies in cases in which the prosecution relies primarily on circumstantial evidence." (*Young*, at p. 1175.)

II. *Legal Principles*

A violation of section 288, subdivision (b)(1) requires proof of the following elements: "(1) physical touching of a child under age 14; (2) for the present and immediate purpose of sexually arousing or gratifying the defendant or victim; and (3) the touching was accomplished by use of force, violence, duress, menace, or fear of injury." (*People v. Poletti* (2015) 240 Cal.App.4th 1191, 1207, citing *People v. Alvarez* (2002) 27 Cal.4th 1161, 1171.) "[T]he harsher penal consequences of a conviction under section 288, subdivision (b), as compared to section 288, subdivision (a), require that the force used for a subdivision (b) conviction be 'substantially different from or substantially greater than that necessary to accomplish the lewd act itself.' " (*People v. Soto* (2011) 51

Cal.4th 229, 242, citing *People v. Cicero* (1984) 157 Cal.App.3d 465, 484;[4] see also *People v. Griffin* (2004) 33 Cal.4th 1015, 1027.)

Resistance by the victim is not required to prove a forcible sexual assault. (*People v. Babcock* (1993) 14 Cal.App.4th 383, 387 (*Babcock*).) However, when evidence of resistance is present, courts have found sufficient evidence of a lewd act committed by the requisite force when the defendant continues the assault despite that resistance. (See *People v. Alvarez* (2009) 178 Cal.App.4th 999, 1005; *People v. Neel* (1993) 19 Cal.App.4th 1784, 1790); *Babcock*, at p. 386.)

For example, in *People v. Alvarez*, the evidence showed that in one of several instances of misconduct, the defendant made his girlfriend's young daughter grab his penis over his underwear and pull on it. Whenever she let go, he grabbed her hands and held them on him, directing her movement. (*Alvarez*, *supra*, 178 Cal.App.4th at p. 1003.) The Court of Appeal concluded there was sufficient evidence of the requisite force to uphold his conviction of forcible lewd conduct because the victim "tried to move her hands away," and the defendant "held them there against her will." (*Id*. at p. 1005.) In that way, the defendant "applied physical force that was substantially different from that necessary to accomplish the lewd acts themselves. All that was necessary . . . was a lewd

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4 The court in *People v. Soto* disapproved *People v. Cicero*, *supra*, 157 Cal.App.3d 465 to the extent *Cicero* held the prosecution must prove as an element of a section 288, subdivision (b) offense that the lewd act committed by force, violence duress, menace or fear also be accomplished against the victim's will. (*People v. Soto*, *supra*, 51 Cal.4th at pp. 243-244, 248.)

touching. The application of force here was substantially different, regardless of whether it was substantially greater." (*Ibid*.)

Furthermore, in *Babcock*, the defendant's first victim recalled that the defendant "took [her] hand and made [her] touch him . . . . " (*Babcock, supra,* 14 Cal.App.4th at p. 385.) The defendant had his pants on at the time of the touching. (*Ibid*.) His second victim indicated that the defendant had grabbed her hand and touched his crotch with it. (*Ibid*.) She tried to pull her hand away, but he pulled it back. (*Ibid*.) The defendant admitted that he grabbed her by the wrist. (*Ibid*.) The Court of Appeal found this was evidence that the defendant "grabbed [the victims'] hands and forced them to touch his genitals," which constituted substantial evidence of the defendant's use of force to support his section 288, subdivision (b) convictions. (*Id*. at p. 386.) Further, as to the first victim, "the evidence indicate[d] [the] defendant overcame [the victim's] resistance when she attempted to pull her hand away from his crotch." (*Ibid*.) "Although resistance is not required to prove forcible sexual assault, the jury could reasonably have considered [the victim's] resistance in assessing whether defendant used force to accomplish the lewd act." (*Id*. at p. 387.) Observing that the jury had considered this evidence and was properly instructed, *Babcock* held substantial evidence supported its finding that defendant used force. (*Id*. at p. 388.)

III. *Analysis*

Villalta's arguments misapply the law, ignore inferences reasonably drawn from S.A.'s testimony, and improperly ask this court to draw contrary inferences in his favor. As we have summarized above, S.A. testified Villalta took her hand and put it on the

outside of his pants on his penis. It was not necessary for S.A. to expressly testify that Villalta "made" her touch him or "forced" her to do so, where the jury could reasonably infer that Villalta controlled her hand so as to put it on his body. As the People point out, "[t]aking someone's hand and physically moving it to your body is—by definition—'making' the victim touch you." In short, Villalta's conduct is enough for a reasonable jury to conclude that Villalta used force substantially different or greater than that necessary to commit the lewd act. (See *Babcock*, *supra*, 14 Cal.App.4th at p. 387; see also *Alvarez*, *supra*, 178 Cal.App.4th at p. 1004.)

Independent of Villalta's act of controlling S.A.'s hand, there is sufficient evidence of his count 1 conviction based solely on S.A.'s testimony that Villalta did not allow her to pull her hand away from his body when she tried. Though S.A. did not specify the means by which she sought to remove her hand or exactly how Villalta stopped her, her testimony shows she tried to pull her hand away and physically tried to leave the closet but Villalta prevented her from doing so. We are not required to infer that Villalta did not permit S.A. to remove her hand by merely instructing S.A. to leave her hand in place, or that S.A. merely did as she was told, as Villalta urges. The requisite force may be found where the defendant physically overcame the victim's resistance, and it is reasonable to infer Villalta did physically overcome S.A.'s resistance by his actions. That is, the jury reasonably inferred that S.A.'s physical effort to remove her hand and leave a closet required corresponding force by Villalta to stop her. (See *Babcock*, *supra*, 14 Cal.App.4th at p. 387; *People v. Bolander* (1994) 23 Cal.App.4th 155, 159 [defendant's act in pulling victim's pants down, then pulling them down again after victim pulled them

up constituted force greater than or different from that necessary to accomplish the lewd acts]; *People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1307 [victim's testimony that she tried to get away from the defendant but he pulled her back, and other victim's testimony that defendant pulled her head forward to perform an act of oral copulation was "unequivocal evidence of the application of physical force" for purposes of section 288, subdivision (b) conviction].)

Our conclusion is not changed by *People v. Raley*, *supra*, 2 Cal.4th 870. In *Raley*, the defendant challenged whether certain evidence of his juvenile sexual misconduct was admissible for purposes of determining penalty under section 190.3, factor (b), which permits the trier of fact to consider the defendant's criminal activity that "involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (*Id*. at p. 906.) In one instance, a witness testified that when she was seven or eight-years old, the defendant invited her into his bedroom, and once inside he shut the door and undressed, told her to undress from the waist down, took her hand, and touched his penis with it. (*Id*. at p. 908.) When the victim's mother came home, he pushed the victim out of the window, threatening to beat her up if she said anything. (*Ibid*.) *Raley* stated this evidence was sufficient for a lewd act conviction under section 288, subdivision (a), but perhaps not under subdivision (b): "Defendant *may* be correct to argue that the evidence was insufficient to support a conviction for a lewd act with force or coercion . . . . There was little or no evidence, apart from the fact of disparity in size and age, that defendant used force or violence beyond the force necessary to accomplish the lewd act." (*Raley*, at p. 908, italics added.) *Raley* nevertheless held this instance of

misconduct was admissible for purposes of section 190.3 because "there was evidence that the entire continuous course of criminal conduct involved the threat of force or violence." (*Raley*, at p. 908.) *Raley*'s discussion is both supposition and dicta. It does not compel a different conclusion in any event because unlike in *Raley*, there is evidence here that S.A. resisted Villalta's efforts by seeking to remove her hand and leave the closet, and corresponding evidence of force when Villalta prevented her from doing so.

Villalta also misreads *People v. Pitmon* (1985) 170 Cal.App.3d 38 (overruled on other grounds as stated in *People v. Soto*, *supra*, 51 Cal.4th at p. 248, fn. 12), in which the defendant grabbed his victim's hand, placed it on his genitals, and rubbed himself with it. (*Pitmon*, at p. 44.) In response to the defendant's challenge to evidence of force sufficient to support a section 288, subdivision (b) conviction, the Court of Appeal pointed out the victim had consistently testified that the defendant had "made" him engage in the prohibited sex acts. (*Pitmon*, at p. 48.) It further stated: "There can be little doubt that defendant's manipulation of [the victim's] hand as a tool to rub his genitals was a use of physical force beyond that necessary to accomplish the lewd act. The facts show defendant had hold of [the victim's] hand throughout this act." (*Ibid*.) Villalta argues that by this language, *Pitmon* holds that the force constituted the defendant's continued grasp of the victim's hand and use as a massaging tool, not the defendant's initial placement of the victim's hand on his body. We cannot agree with this narrow reading of *Pitmon*. We understand the appellate court to refer to the *entire* manipulation of the victim's hand including the defendant's initial grabbing, placement, and rubbing. Hence, the court's

observation that the defendant was holding the victim's hand "throughout this act." (*Id*. at p. 48.)

Our understanding is in accord with the court in *Babcock*, which held that evidence that the defendant grabbed his victims' hands and forced them to touch him was "virtually indistinguishable" from *Pitmon*. (*Babcock*, *supra*, 14 Cal.App.4th at p. 386.) Villalta's attempt to distinguish *Babcock* is unavailing, as we have already concluded the jury in this case could reasonably infer he made S.A. touch him from S.A.'s testimony that he took her hand and put it on him. We reject any suggestion by Villalta that a reasonable jury could not find he used the requisite force to support his forcible lewd conduct conviction absent evidence that he moved or rubbed S.A.'s hand on him after placing it on his body.

Having found sufficient evidence of force, we need not consider whether there was sufficient evidence that Villalta also accomplished the lewd acts by means of duress, menace, or fear. Such evidence, however, exists.

" ' "[D]uress as used in the context of section 288 [means] a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted." ' " (*People v. Garcia* (2016) 247 Cal.App.4th 1013, 1023, italics omitted, quoting *People v. Leal* (2004) 33 Cal.4th 999, 1004.) The total circumstances, including the age of the victim, his or her relationship to the defendant, the degree of isolation, and

the physical disparity in size are all factors to be considered in appraising the existence of duress. (See *People v. Veale* (2008) 160 Cal.App.4th 40, 46-47.)

S.A. was between the ages of six and a half and seven years old when Villalta began abusing her. She was at a significant size and strength disadvantage, and Villalta lured her into a closet to commit his act. Furthermore, the jury could reasonably conclude S.A. viewed Villalta, the husband of her caretaker and an adult, as an authority figure. These facts support an inference of duress. (See *Pitmon*, *supra*, 170 Cal.App.3d at p. 51 [holding that at the victim's age of eight, "adults are commonly viewed as authority figures" and the isolated location of the encounter increased "the susceptibility of a typical eight-year-old to intimidation by an adult"]; see also *People v. Veale*, *supra*, 160 Cal.App.4th at p. 47 [victim's stepfather was an authority figure in the household and victim was normally alone in a bedroom with him].) Thus, even if there was no evidence that Villalta used force, there was substantial evidence from which the jury could find Villalta accomplished the lewd act by means of duress.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HALLER, Acting P. J.

IRION, J.